

FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

Market Entry and Regulation of )  
Foreign-affiliated Entities )

IB Docket No. 95-22

RM-8355

RM-8392

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REPLY COMMENTS OF THE  
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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	)	RM-8355
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	)	

REPLY COMMENTS OF THE  
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

On behalf of the Executive Branch, the National Telecommunications and Information Administration ("NTIA")<sup>1</sup> respectfully submits the following Reply Comments in response to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.<sup>2</sup> These Reply Comments reflect the views of the Departments of Commerce,<sup>3</sup> Defense, Justice, State, Treasury, and the Office of United States Trade Representative.

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<sup>1</sup> NTIA is the Executive branch agency principally responsible for the development and presentation of domestic telecommunications and information policy. NTIA, in coordination with the Department of State and other interested agencies, also develops international telecommunications and information policy. See 47 U.S.C. § 902 (Supp. V 1993).

<sup>2</sup> Market Entry and Regulation of Foreign-affiliated Entities, IB Docket No. 95-22, *Notice of Proposed Rulemaking*, FCC 95-53 (released Feb. 17, 1995) ("Notice").

<sup>3</sup> NTIA, along with the International Trade Administration, represents the Department of Commerce for purposes of these comments.

## I. INTRODUCTION

As stated in our initial comments, the Executive Branch has an interest in the issues raised in the Commission's Notice. Not only do they touch on areas in which the Commission and the Executive Branch have overlapping jurisdiction, but they may affect the U.S. Government's bilateral and multilateral negotiations and its efforts to develop a Global Information Infrastructure.<sup>4</sup> Accordingly, in applying an effective market access test under both Sections 214 and 310(b)(4) of the Communications Act of 1934, as amended ("Communications Act"), the Commission must take into account the Executive Branch's role with respect to foreign market access determinations.<sup>5</sup>

The Constitution, as well as numerous statutes, gives the President and the Executive Branch broad authority over U.S. national security, foreign relations, trade, investment and antitrust policy, any of which may include telecommunications matters.<sup>6</sup> The Commission, on the other hand, has responsibility under the Communications Act over, among other items, the regulation of telecommunications carriers in interstate and foreign commerce.<sup>7</sup> When the Commission's authority overlaps with the more extensive responsibilities of Executive Branch agencies, to ensure consistency in U.S. international telecommunications policy, the Commission must give great deference to the Executive Branch with respect to U.S. national security, foreign relations, the interpretation of international agreements and

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<sup>4</sup> NTIA Comments at 4-8 (unless otherwise noted, comments filed in this proceeding were filed on Apr. 11, 1995).

<sup>5</sup> NTIA Comments at 11-12.

<sup>6</sup> NTIA Comments at 8.

<sup>7</sup> NTIA Comments at 10.

trade issues, as well as with respect to direct investment as it relates to international trade policy.<sup>8</sup> The Commission must also take into account the Executive Branch's views and decisions with respect to antitrust and telecommunications and information policies.<sup>9</sup>

Many parties filed comments in this proceeding supporting the view that the Executive Branch must play a central role in making market access determinations.<sup>10</sup> While many parties supported the Commission's incorporation of market access considerations as an element of market entry determinations, they also recommended that the Commission recognize the critical role of the Executive Branch. In particular, these parties urged the Commission to ensure that any regulatory policies it may ultimately adopt are consistent with

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<sup>8</sup> NTIA Comments at 10-11.

<sup>9</sup> NTIA Comments at 11-12, 14-15, 19. In our initial comments we stated that amending Section 310(b)(4) would be our preferred approach and that under such an approach the Executive Branch should make market access determinations for particular countries. *Id.* at 17-18. In later recommendations to Congress we altered our position with respect to legislation. In our initial comments we also stated that under existing regulatory authority the Commission should make Section 310(b)(4) determinations but with great deference to the Executive Branch's views and decisions, as we reiterate here.

<sup>10</sup> Some parties asserted more broadly that the Commission lacked jurisdiction to make market access determinations. According to these parties the Commission cannot make market access determinations because it lacks jurisdiction to assume the functions of the Executive Branch, such as the ability to conduct foreign affairs and to develop and implement U.S. trade policy. *See e.g.*, Comments of Telefonica Larga Distancia de Puerto Rico, Inc. at 5-19 (TLD); Comments of Deutsche Telekom AG at 12-14, 19-22 (DT); Comments of Sprint Communications Company L.P. at 23-25 (Sprint). According to these parties, the Commission's broad public interest authority is limited in this instance by the Executive Branch's jurisdiction over and responsibility for conducting foreign relations and formulating U.S. trade policy. TLD Comments at 5-8; DT Comments at 14; Sprint Comments at 23-25.

U.S. Government policies and complement ongoing bilateral and multilateral negotiations.<sup>11</sup>

Without appropriate guidance from the Executive Branch, market access determinations by the Commission could seriously affect international negotiations, such as those conducted under the auspices of the World Trade Organization (WTO).<sup>12</sup>

We agree with the many parties who support the Commission's ability to consider its proposed effective market access test, but caution the Commission against acting without consideration and deference to the views of the Executive Branch. While the Commission can help effectuate the policy goals and initiatives of the Executive Branch, it must also recognize the Executive Branch's crucial role in making market access determinations. Without such deference, the Commission could inadvertently adversely affect bilateral and multilateral negotiations as well as other initiatives such as the Global Information Infrastructure.<sup>13</sup>

To avoid such results, these Reply Comments propose a process by which the Executive Branch will make known to the Commission its views and decisions on those

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<sup>11</sup> See, e.g., Comments of Cable & Wireless, Inc. at 3 (C&W); Comments of AirTouch Communications at 9; Comments of Professor Jonathon D. Aronson at 2; Comments of France Telecom at 19, n.16; Comments of NYNEX Corporation at 9-10; Comments of Motorola at 9; Comments of Sprint at 23-25.

<sup>12</sup> See, e.g., C & W Comments at 3; Comments of Motorola at 9; NYNEX Comments at 9-10; Sprint Comments at 23-25. Indeed, some parties argued that any foreign market evaluation could, or should, be carried out within the framework of the WTO. See e.g., Comments of BT North America Inc. at 4, n.5 (BTNA); Comments of the Directorate General of Posts and Telecommunications (France) at 2 (dated Apr. 7, 1995); Comments of the British Government at 6, para. 14 (dated Apr. 10, 1995).

<sup>13</sup> See The President's Information Infrastructure Task Force, chaired by Ronald H. Brown, Secretary of Commerce, Global Information Infrastructure: Agenda for Cooperation (Feb. 1995) (GII: Agenda for Cooperation).

Section 214 and 310(b)(4) applications that raise issues within the authority and expertise of the Executive Branch agencies. As one party noted in discussing proposed changes to Section 310(b)(4) of the Communications Act, a process is needed whereby the Commission makes sure that Executive Branch agencies "have appropriate opportunities and regularized procedures to provide input . . . ".<sup>14</sup> We agree and also believe a similar process is needed for Section 214 applications that involve foreign ownership of telecommunications facilities.

These Reply Comments also provide the Executive Branch's general views on the relationship between the proposed rules and the goals of the Global Information Infrastructure.

## II. PROPOSAL FOR PROVIDING EXECUTIVE BRANCH GUIDANCE TO THE COMMISSION

In these Reply Comments, we propose a process for the Executive Branch to make its views known to the Commission with respect to those issues within the authority and expertise of the Executive Branch. Clearly, the Executive Branch may not wish to comment on every Section 214 or 310(b)(4) application, nor do we wish to hamper the Commission's ability to respond to such applications. Therefore, an appropriate process would resolve applications expeditiously, while ensuring that the respective authorities of the Executive Branch and Commission are taken into account. To that end, we propose the following two-step procedure.

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<sup>14</sup> Motorola Comments at 9.

First, the Commission should amend its rules to ensure that each relevant Executive Branch agency receives notification of Section 214 applications that involve foreign ownership of telecommunications facilities and all requests that involve Section 310(b)(4).<sup>15</sup> These applications are likely to raise issues within the scope of authority and expertise of the Executive Branch agencies. Moreover, we request that the Commission notify the Executive Branch of any proceedings that raise market access issues, whether or not a Section 214 or 310(b)(4) application is filed. For example, in transactions involving minority interests under the Section 310(b)(4) threshold, private parties may take the view that they are not obliged to make any application to the Commission, and the Commission would act on its own initiative to modify the U.S. carrier's existing Section 214 authorizations. At an early stage in any such proceeding, the Commission should notify each relevant Executive Branch agency.

Second, if the Executive Branch decides to respond, it will endeavor to do so within 30 days after the end of the pleading cycle.<sup>16</sup> In proposing this approach we hope to avoid unduly delaying the Commission in responding to Section 214 and 310(b)(4) applications.

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<sup>15</sup> Currently, under Section 214(b) of the Act, the Commission, upon receipt of a Section 214 application, must cause a copy of such application to be filed with the Secretary of Defense and, with respect to applications involving service to foreign points, the Secretary of State. 47 U.S.C. § 214(b). Under our proposal the Commission would continue its current practice with respect to the Secretaries of Defense and State. The Commission's rules, however, would be amended to ensure that the Departments of Commerce, Justice, Treasury, and the United States Trade Representative are also notified when a Section 214 application involves foreign ownership of telecommunications facilities.

<sup>16</sup> If the Executive Branch intends to express a view on a particular application or request but will not be able to complete its review within the proposed time frame, it will notify the Commission.

As evidenced by the record, however, a process must be developed that ensures that the Executive Branch has an opportunity to carry out its responsibilities as mandated by the Constitution and a number of statutory authorities. Through our proposed process the Executive Branch and the Commission can coordinate achievement of our common goal -- to promote effective competition in the global market for communications services.

III. IMPACT OF THE COMMISSION'S PROPOSED MARKET ENTRY TEST ON THE PURSUIT OF THE GLOBAL INFORMATION INFRASTRUCTURE GOALS AND OBJECTIVES

The Executive Branch urges the Commission to exercise caution in applying its proposed market access test as part of the public interest analysis under Section 214 and Section 310(b)(4). While the Executive Branch fully supports the Commission's stated goals of promoting effective competition in the global market for communications services and preventing anti-competitive conduct in the provision of international services or facilities, we have some concerns that the tailoring of Commission regulation to the third stated goal of encouraging foreign governments to open their communications markets would implicate on-going Executive Branch initiatives.<sup>17</sup> The Commission should take care that its actions complement, rather than undermine, Executive Branch initiatives.

The Executive Branch has reviewed the proposed market entry rules in light of the goals and objectives of the GII: Agenda for Cooperation. As the Commission is aware, the Executive Branch advanced the following five core principles as the foundation for the

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<sup>17</sup> Notice, para. 26.



Global Information Infrastructure: encouraging private sector investment; promoting competition; providing open access; creating a flexible regulatory environment; and ensuring universal service.

In support of those principles, the Executive Branch concurs with the Commission's efforts to clarify its regulation of international carriers and bring about increased competition in the provision of international services. The application of the proposed rules should improve incentives for foreign facilities-based telecommunications carriers operating in open markets to enter the U.S. market for international facilities-based services.

Certain parties have raised concerns in their comments about the effects of the proposed rules on the standstill contained in the Ministerial Decision on Negotiations in Basic Telecommunications, adopted at the conclusion of the Uruguay Round negotiations.<sup>18</sup> The standstill provision would seem to cover measures that are applied solely to create barriers to increase leverage in the negotiations. The Commission's intent in proposing a new rule, in contrast, appears to be to provide a greater measure of certainty for foreign investors by formalizing considerations of market openness that were previously undertaken without specific written criteria or standards. In addition, the Commission seems to be proposing a new rule to codify past practice and to more carefully reflect competition policy.

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<sup>18</sup> Paragraph 7 of the Declaration contained an understanding that: ". . . no participant shall apply any measure affecting trade in basic telecommunications in such a manner as would improve its negotiating position and leverage. It is understood that this provision shall not prevent the pursuit of commercial and governmental arrangements regarding the provision of basic telecommunications services." Final Texts of the GATT Uruguay Round Agreements Including the Agreement Establishing the World Trade Organization as Signed on April 15, 1994, Marrakech, Morocco, Decision on Negotiations on Basic Telecommunications at 414.

As noted in our initial comments, Executive Branch agencies are seeking increased market access to foreign telecommunications markets for U.S. firms through various means, including multilateral trade negotiations. The good example set by U.S. pro-competitive, deregulatory telecommunications policies over the past two decades has served both the Commission and the Executive Branch well in achieving the goal of increased liberalization overseas.

Our primary objective in offering these comments is to ensure that the Commission's regulatory policies are consistent with and supportive of the goals and objectives established in the GII: Agenda for Cooperation.

VI. CONCLUSION

For the foregoing reasons, NTIA respectfully requests that the Commission adopt the recommendations contained in the foregoing Reply Comments.

Respectfully submitted,

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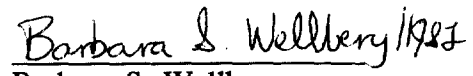
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May 12, 1995

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I, Cathleen M. Kelly, do hereby certify that I have this 12th day of May, 1995, delivered copies of the foregoing Reply Comments to the Notice of Proposed Rulemaking, dated March 11, 1995, via hand delivery (\*) or by United States mail, postage prepaid, to the following parties of record in this proceeding:

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